

NO. 49716-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

POTELCO, INC. and JEFF LAMPMAN,

Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
Office Id. No. 91022
7141 Cleanwater Drive SW
P.O. Box 40121
Tumwater, WA 98501
(360) 586-7715

TABLE OF CONTENTS

| | | |
|------|---|---|
| I. | INTRODUCTION..... | 1 |
| II. | ISSUES..... | 1 |
| | 1. Compliance with inspection requirement: WAC 296-46B-901(9) requires that a contractor request an electrical inspection within one day after it energizes a project or within three days after work completion, which ever come first. The Department’s inspector testified that Potelco did not request a final inspection until two months after project completion and no witness claimed that Potelco requested an inspection before that date. Does substantial evidence support the Electrical Board’s finding that Potelco failed to timely request an inspection? | 1 |
| | 2. Compliance with administrator requirement: RCW 19.28.061 requires an administrator to ensure compliance with electrical laws. Potelco did not timely request inspection as required by WAC 296-46B-901(9). The administrator did not do anything to ensure that Potelco timely requested an inspection. Does substantial evidence support the Electrical Board’s finding that Potelco’s administrator failed to ensure that Potelco complied with the electrical laws? | 2 |
| III. | STATEMENT OF THE CASE | 2 |
| | A. The Department’s Electrical Inspector Conducted an Inspection of Potelco’s Work at a School in July 2013, Which Potelco Had Not Requested..... | 2 |
| | B. Potelco First Requested an Inspection of Its Work at the School in October 2013, After the Inspector Reminded It That It Needed To Request One..... | 3 |
| | C. No Potelco Employee Testified To Requesting an Inspection Before October 2013 | 4 |

| | | |
|-----|---|----|
| D. | The Board and the Superior Court Affirmed the Citations Against Lampman and Potelco | 8 |
| IV. | STANDARD OF REVIEW..... | 9 |
| V. | ARGUMENT | 10 |
| A. | Substantial Evidence Supports the Electrical Board’s Finding That Potelco Failed To Timely Request a Final Inspection..... | 11 |
| B. | Substantial Evidence Supports the Electrical Board’s Finding That the Administrator Failed To Ensure That Potelco Timely Requested a Final Inspection..... | 14 |
| 1. | A showing that an administrator made minimal efforts to educate the contractor’s workers regarding the electrical laws does not satisfy RCW 19.28.061 | 15 |
| 2. | Ample evidence supports the Electrical Board’s finding that the administrator did not ensure Potelco complied with the electrical laws | 21 |
| VI. | CONCLUSION | 22 |

TABLE OF AUTHORITIES

Cases

| | |
|---|------------|
| <i>Aviation West Corp. v. Dep't of Labor & Indus.,</i> 138 Wn.2d 413, 980 P.2d 701 (1999)..... | 11 |
| <i>Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., PLLC,</i> 168 Wn.2d 421, 228 P.3d 1260 (2010)..... | 15 |
| <i>Johnson v. Dep't of Health,</i> 133 Wn. App. 403, 136 P.3d 760 (2006)..... | 9, 10, 14 |
| <i>National Elec. Contractors Ass'n. v. Riveland,</i> 138 Wn.2d 9, 978 P.2d 481 (1999)..... | 14 |
| <i>Port of Seattle v. Pollution Control Hearings Bd.,</i> 151 Wn.2d 568, 90 P.3d 659 (2004)..... | 10, 11 |
| <i>State v. Bash,</i> 130 Wn.2d 594, 925 P.2d 978 | 18, 19, 20 |
| <i>State v. Cleppe,</i> 96 Wn.2d 373, 635 P.2d 435 (1981)..... | 20 |
| <i>State v. Velasquez,</i> 176 Wn.2d 333, 292 P.3d 92 (2013)..... | 16 |
| <i>Tapper v. Employment Sec. Dep't,</i> 122 Wn.2d 397, 858 P.2d 494 (1993)..... | 9 |
| <i>Waste Mgmt. of Seattle, Inc. v. Util. & Trans. Comm'n,</i> 123 Wn.2d 621, 869 P.2d 1034 (1994)..... | 9, 14 |
| <i>William Dickson Co. v. Puget Sound Air Pollution Control Agency,</i> 81 Wn. App. 403, 914 P.2d 750 (1996)..... | 18 |

Statutes

| | |
|--|----|
| Laws of 1983, ch. 206 § 6; Laws of 2006 ch. 185, § 9 | 17 |
|--|----|

| | |
|---------------------------|--------|
| RCW 19.28 | 14 |
| RCW 19.28.010 | 9, 18 |
| RCW 19.28.061 | passim |
| RCW 19.28.061(5)(b) | 4 |
| RCW 19.28.101(1) | 12 |
| RCW 19.28.131 | 9 |
| RCW 34.05.030(5) | 9 |
| RCW 49.17.120 | 17 |

Regulations

| | |
|-----------------------------|---------------|
| WAC 296-46B-901(9) | 1, 2, 4, 10 |
| WAC 296-46B-901(9)(a) | 8, 12, 13, 14 |

Other Authorities

| | |
|---|----|
| Final Legislative Bill Report on Engrossed Substitute S.B. 3055, at 3, 5-6, 48th Leg., Reg. Sess. (Wash. 1983) | 17 |
| Senate Bill 6225 | 16 |
| Webster's Third New International Dictionary 756 (2002) | 15 |

I. INTRODUCTION

Because working with electricity imposes dangers on both workers and the public, Washington State's electrical laws take multiple steps to ensure that electrical contractors follow important safety and quality control rules. The Legislature requires not just that electricians follow the law, but that the electrical contractor designate a special employee to "[e]nsure that all electrical work complies with the electrical installation laws and rules of the state"—an "administrator." RCW 19.28.061.

Here, Potelco, Inc. performed electrical work at a school without requesting an inspection until two months after it completed its work. WAC 296-46B-901(9) required Potelco to request an inspection within one day after it energized the project or within three days after the date that it completed its work, whichever came first. So the Department of Labor and Industries properly cited Potelco for violating this rule and it also properly cited the administrator for failing to ensure that the Potelco crew requested an inspection. And the Electrical Board and superior court properly affirmed. This Court should too.

II. ISSUES

1. **Compliance with inspection requirement:** WAC 296-46B-901(9) requires that a contractor request an electrical inspection within one day after it energizes a project or within three days after work completion, whichever come first. The Department's inspector testified that Potelco did not request a final inspection

until two months after project completion and no witness claimed that Potelco requested an inspection before that date. Does substantial evidence support the Electrical Board's finding that Potelco failed to timely request an inspection?

2. **Compliance with administrator requirement:** RCW 19.28.061 requires an administrator to ensure compliance with electrical laws. Potelco did not timely request inspection as required by WAC 296-46B-901(9). The administrator did not do anything to ensure that Potelco timely requested an inspection. Does substantial evidence support the Electrical Board's finding that Potelco's administrator failed to ensure that Potelco complied with the electrical laws?

III. STATEMENT OF THE CASE

A. The Department's Electrical Inspector Conducted an Inspection of Potelco's Work at a School in July 2013, Which Potelco Had Not Requested

Potelco is an electrical contractor that performs electrical work in Washington State. CP 79-80. In July 2013, Potelco performed electrical work at an elementary school in the White River School District. CP 46-47, 73. The school district asked Potelco to fix a problem with the school's power supply. CP 81.

On July 17, 2013, a Department electrical inspector, John Boespflug, was inspecting jobsites in the Buckley, Washington area. CP 42, 45. As part of his job duties, he drives around in an assigned geographic area and inspects electrical work to ensure that the work complies with the electrical laws, even if the contractor did not request an inspection. CP 45. Boespflug also inspects electrical work upon request.

CP 45.

On July 17, Boespflug noticed a Potelco truck behind an elementary school near an open access door to the electrical transformer, so he decided to inspect Potelco's work. CP 45-46. Potelco did not summon Boespflug to perform this inspection: he inspected the work on his own initiative because he saw the jobsite as he drove by.

See CP 46, 689.

Potelco was installing an electrical wire between a Potelco utility pole and the school's transformer. CP 47. The transformer was not active and the wire had not been energized. CP 46, 50. The wire was rated to carry up to 15,000 volts. CP 48. At the time that Boespflug happened upon the site, Potelco had removed the old wire that connected the utility pole to the transformer and was connecting a new wire. CP 48-49. Potelco needed to get more "termination ends" to finish the wire installation. CP 49.

A "termination end" is a kit that completes the connection between a wire and a transformer. CP 49. Boespflug expected Potelco to finish installing the termination ends later that day. CP 49-50.

B. Potelco First Requested an Inspection of Its Work at the School in October 2013, After the Inspector Reminded It That It Needed To Request One

Boespflug spoke with the Potelco workers who were performing the electrical installation and told the crew that "everything looked good"

but reminded them that they would need to “make sure” they requested an inspection when they completed their work. CP 50.

Boespflug took a vacation at some point after July 17, 2013.

CP 51. A few months later, after returning from vacation, he checked the Department’s records to see if Potelco had requested an inspection after it completed its work at the school. CP 51-52, 57. It had not. CP 52.

Boespflug called Potelco’s electrical administrator, Jeff Lampman, and reminded him that he needed to request a final inspection for the project. CP 52. Boespflug also told Lampman that since two months had gone by since the work had been completed, the Department would need to cite Potelco for its failure to timely request a final inspection. CP 52.

In October 2013, the Department issued two citations: one to Potelco under WAC 296-46B-901(9) for failing to timely request a final inspection and one to Lampman under RCW 19.28.061(5)(b) for failing to ensure that Potelco made a timely request for a final inspection.

CP 54-56, 697, 700. The penalties were \$250 to Potelco and \$100 to Lampman. CP 55-57. Potelco appealed both citations.

C. No Potelco Employee Testified To Requesting an Inspection Before October 2013

Potelco presented several witnesses at hearing but none testified that they requested a final inspection before October 2013.

Langberg: Mark Langberg, a Potelco foreman, was at the jobsite when Boespflug arrived. CP 87, 93. Langberg testified that when the inspector was there, the crew was in the midst of putting the termination ends in place and had not finished the work. CP 93-94.

Langberg testified that he assumed that Boespflug was doing an inspection and that he believed an inspection was done “as required for the permit process.” CP 95. He did not call Boespflug or request an inspection from him. CP 96. Langberg assumed that a Potelco employee named Glenn Thomas had requested an inspection from the Department, but Langberg acknowledged that he had no basis for concluding that Thomas had done so. CP 96. (Thomas obtained the permit for Potelco and he may have also been responsible to request an inspection. CP 114, 120. Thomas did not testify.)

Hudson: Kevin Hudson, a lineman, testified regarding his observations and he recalled Boespflug telling Potelco to “smoke test” the line, which meant energizing the wires to test the installation. CP 103. He estimated that after Boespflug left the jobsite, it took two more hours to complete the installation. CP 103.

Hudson did not request an inspection. CP 105. Hudson acknowledged that he did not have any basis to say that anyone at Potelco had requested an inspection. CP 105.

Lampman: Lampman is Potelco's electrical administrator and contracts manager. CP 109-10. He has been the administrator since 2005 and he "ensure[s] that all the electrical work we do complies with" Washington laws. CP 110, 116. Lampman explained that in his role as contract manager he is "a conduit for all the work" Potelco does and so he "is aware of the work prior to it being done." CP 110.

Lampman provides training to the managers and "some of the general foremen" and he forwards certain publications to Potelco managers, such as a Department "E-news letter," which the managers are to disseminate "down through the ranks." CP 110-11. When the Department issues a citation to Potelco, Lampman sends out an email afterwards that recaps what happened. CP 111.

Lampman knew about the White River School District project before Potelco started the work. CP 113-14. Thomas contacted Lampman about that project. CP 114. They discussed the fact that if Potelco did any work besides troubleshooting, Potelco would need to request a permit from the Department—those in the industry call this "pull[ing] a permit"—and Thomas said he would get one. CP 114.

Lampman knew that when Potelco pulls a permit for the type of work that Potelco performed at the school district, someone from Potelco must also request a Department inspection. CP 116. Despite this

requirement, he did not believe anyone from Potelco requested an inspection for the school project. CP 117.

When asked who is responsible for requesting a final inspection in a given project, Lampman indicated that it is “either the person that pulled the permit or sometimes me.” CP 120. When asked what he does to ensure that Potelco requests a final inspection, Lampman said that he “usually” contacts the person who pulled the permit, but other times “just trust[s] that they are going to handle it.” CP 121.

Lampman admitted that he does not know whether Thomas requested a final inspection in this case. CP 122. He did not ask Thomas if he had requested a final inspection. CP 122. It was not until October 2013, after Boespflug reminded Lampman about the need for a final inspection, that Potelco requested one. CP 122.

Boespflug later gave the electrical installation final approval after verifying that all of the equipment that Potelco used when it completed the installation was consistent with the relevant rules.¹ CP 130-31. He did not physically inspect the work because it is not preferable “to open energized transformers.” CP 130.

¹ While inspecting the site, Boespflug noticed that Potelco was using installation kits for installing the termination ends and he was not certain whether the specific installation kits that were being used were consistent with the electrical code and the rules. BP 46. Boespflug later confirmed that the kits that Potelco used complied with the code and the rules. CP 46, 130-31.

D. The Board and the Superior Court Affirmed the Citations Against Lampman and Potelco

After the hearing, the administrative law judge upheld both citations. CP 155-61. The judge found that Potelco completed the school district work on July 17, 2013, and that it energized the installation on or before July 18, 2013. CP 157. The judge found that Potelco requested a final inspection in October 2013 and that it had not requested an inspection before then. CP 157. The judge concluded that Potelco violated WAC 296-46B-901(9)(a) by failing to timely request a final inspection. CP 159.

The judge also found that Lampman was Potelco's electrical administrator and that Lampman did not know whether Thomas had timely requested a final inspection. CP 158. Within Conclusion of Law No. 5.6, the judge found that "Lampman did not check to see if [a] final inspection had been requested until after he had been contacted" by the Department's inspector in October 2013. CP 159. The judge concluded that RCW 19.28.061 made Lampman, as the administrator, responsible for ensuring that all electrical work performed by Potelco complied with the electrical laws and that Lampman's "minimal actions" did not ensure that Potelco's work complied with those laws. CP 159.

Potelco filed a petition for review with the Electrical Board.

CP 19-25. It affirmed both citations. CP 166-69. The Electrical Board adopted the findings of fact and conclusions of law contained in the initial order, with the exception of omitting a conclusion of law that stated that RCW 19.28.061 imposed strict liability on electrical administrators. CP 166-69. The final order replaced it with a new conclusion of law stating, “The statutory requirement of strict conformity contained in RCW 19.28.010 addresses technical requirements and does not require strict liability for [an] electrical administrator.” CP 167.

Potelco appealed and the superior court affirmed the Electrical Board’s final order. CP 787-90. Potelco appeals.

IV. STANDARD OF REVIEW

The Administrative Procedure Act (APA) applies here. RCW 34.05.030(5); RCW 19.28.131, .271(2). The appellate court applies the APA standards directly to the record before the agency. *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). On appeal in an Electrical Board case, the court reviews the Electrical Board’s decision because it is the highest forum that exercised factfinding authority. *See Johnson v. Dep’t of Health*, 133 Wn. App. 403, 411, 136 P.3d 760 (2006); RCW 19.28.131. Also, the court reviews the Electrical Board’s final order, not board members’ individual statements made during the board hearing. *See Waste Mgmt. of Seattle, Inc. v. Util. &*

Trans. Comm'n, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

To determine whether substantial evidence exists, the court reviews the record in the light most favorable to the prevailing party. *See Johnson*, 133 Wn. App. at 411. In doing so, the court does not weigh witness credibility or substitute its judgment for that of the factfinder. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004).

V. ARGUMENT

Administrators have incentives to make sure that their companies follow laws about electrical installations because if this does not occur the law imposes a civil penalty on the administrators. RCW 19.28.061. This creates a powerful reason for compliance when dealing with the dangers of electricity. Potelco tries to water RCW 19.28.061 down to a rule that if an administrator generally talks to his or her co-workers about electrical law compliance then that satisfies the statute. But Potelco's proposal is contrary to the Legislature's intent to have laws that protect workers and the public from the very real hazards of electrical construction work. This Court should reject Potelco's view of the law.

The electrical laws require that after a contractor completes final work on an electrical project, it must request an inspection. WAC 296-46B-901(9). The Electrical Board found that Potelco failed to

timely request a final inspection and that the administrator did not ensure that Potelco requested one. Potelco assigns error to these findings but makes no attempt to argue that substantial evidence does not support them. App.'s Br. 2, 7-11. Instead, turning the standard of review on its head, Potelco argues that it should prevail because it claims that substantial evidence supports its theory of the case. App.'s Br. 2, 7-11. But this Court considers whether the Electrical Board's findings are supported by substantial evidence, not whether the Board hypothetically could have made a different finding based on the board record. *See Port of Seattle*, 151 Wn.2d at 588 (explaining that when a court reviews a finding for substantial evidence it does not reweigh the credibility of witnesses and does not substitute its judgment for that of the factfinder); *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 429, 980 P.2d 701 (1999) (explaining that the possibility of drawing different conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence). Because the factfinder could believe the inspector when he testified that Potelco did not timely request an inspection, substantial evidence supports the findings. This Court should affirm.

A. Substantial Evidence Supports the Electrical Board's Finding That Potelco Failed To Timely Request a Final Inspection

Potelco failed to comply with WAC 296-46B-901(9)(a) because it did not timely request an inspection after it completed its electrical installation work. RCW 19.28.101(1) requires that “The director shall cause an inspector to inspect all wiring, appliances, devices, and equipment to which this chapter applies except for basic electrical work as defined in this chapter.” Contractors are required to request inspections for their work under WAC 296-46B-901(9)(a), which provides:

Requests for inspections must be made no later than three business days *after* completion of the electrical/telecommunications installation or one business day *after* any part of the installation has been energized, *whichever occurs first*.

(Emphasis added.)

Here, the Electrical Board’s finding that Potelco failed to timely request an inspection has ample support in the record. CP 155-61, 166-69. Potelco finished its electrical work on July 17, 2013, and it energized the installation on July 18, 2013. CP 74-75. So under the regulation’s plain language, Potelco had to request a final inspection no later than one day after July 18, the day it energized the installation.² Potelco did not do so. Boespflug testified that Potelco did not request an inspection until October 2013, long after work completion. CP 52, 57.

² If it had requested an inspection three days after the work completed, it would have been too late because it had energized the project.

No Potelco witness claimed that he timely requested an inspection. *See* CP 96, 105. No one claimed to have summoned Boespflug to the jobsite and no one claimed to have asked Boespflug, while he was there, to conduct a final inspection. *See* CP 96, 105. And, tellingly, Lampman admitted that Potelco had not timely requested an inspection. CP 117.

Rather than point to any evidence that a Potelco employee timely requested an inspection, Potelco argues that its employees could reasonably interpret their “conversation” with Boespflug as a “request” for an inspection. *See* App.’s Br. 7. But no one requested an inspection during the conversation with Boespflug, and simply assuming that an inspection occurred does not satisfy the law. Rather, WAC 296-46B-901(9)(a) requires a request and the inspector testified that Potelco made no request, which is all this Court need consider on substantial evidence review. CP 51-52.³

In any event, there could not have been a request to do a final inspection that called the inspector to the site because the evidence shows that Potelco had not finished the installation or energized it when

³ Potelco focuses on Langberg’s testimony, who indicated that he assumed that Boespflug was inspecting Potelco’s work. App.’s Br. 7 (citing CP 627). But Langberg denied that he requested an inspection from Boespflug. CP 96. Potelco emphasizes that WAC 296-46B-901(9)(a) does not specify any particular method by which an electrical contractor must request an inspection. App.’s Br. 7. While true, this does not help Potelco because the record does not show that Potelco made any sort of request until after the deadline lapsed. CP 52, 96, 105, 117, 122.

Boespflug left the jobsite. CP 49-50, 94, 103. Potelco needed to request another inspection because WAC 296-46B-901(9)(a) requires the inspection be requested *after* work completion or energization.

Potelco also points to statements from some Board members who voted to reverse. App.'s Br. 8-9. But the court reviews an administrative board's final order, not the comments of individual members who make up a board. *Waste Mgmt.*, 123 Wn.2d at 633; *see Johnson*, 133 Wn. App. at 411. As substantial evidence supports the findings in the Electrical Board's final order, this Court should affirm.

B. Substantial Evidence Supports the Electrical Board's Finding That the Administrator Failed To Ensure That Potelco Timely Requested a Final Inspection

The Legislature designed the electrical laws to protect workers and the public. *See National Elec. Contractors Ass'n. v. Riveland*, 138 Wn.2d 9, 21-22, 978 P.2d 481 (1999) (electrical laws further critical public health and safety policy interests by ensuring that electrical work is performed competently and only by trained individuals). Electrical administrators play an important role under RCW 19.28 in ensuring that an electrical contractor's work complies with the electrical laws and the Legislature makes an electrical administrator responsible when he or she fails to make certain that the contractor complies with the relevant laws.

RCW 19.28.061 required Lampman to ensure that the Potelco crew

requested a final inspection. The administrator admits the crew did not request one. CP 117. Under this circumstance, the Court should affirm the Electrical Board's ruling that Lampman did not comply with RCW 19.28.061. Even if the Court wanted to look at the surrounding circumstances, Lampman's testimony established that he did not check in with the crew to determine if a Potelco employee requested an inspection, and he did nothing beyond sending emails with general reminders to follow the electrical laws. CP 122-24. Such a circumstance forms no defense to the citation.

1. A showing that an administrator made minimal efforts to educate the contractor's workers regarding the electrical laws does not satisfy RCW 19.28.061

RCW 19.28.061 requires every electrical contractor to designate an administrator and to advise the Department of that designation. A person may serve as the administrator for only one contractor. RCW 19.28.061. The administrator must "ensure that *all* electrical work complies with the electrical installation laws and rules of the state." *Id.* (emphasis added.) "Ensure" here means "to make sure, certain, or safe: GUARANTEE." Webster's Third New International Dictionary 756 (2002).

A statute is unambiguous if there is only one reasonable interpretation of it. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., PLLC*, 168 Wn.2d 421, 433, 228 P.3d 1260 (2010).

The only reasonable interpretation of RCW 19.28.061 is that an administrator must make certain that electrical work performed by the electrical contractor complies with the laws governing that work, which includes timely requesting a final inspection. Because the statute requires that an administrator ensure that the work performed by the contractor actually complies with the law, an administrator is also subject to a citation when the contractor fails to comply with the law.

Potelco's suggestion that the Department should not cite Lampman under RCW 19.28.061 if he made some efforts to advise his coworkers about electrical laws—even if he did not ensure that Potelco's work complied with those laws—fails because the statute requires ensuring electrical-law compliance, not just providing occasional reminders to co-workers about the electrical laws. *See App.'s Br. 9-10.*

If the Legislature had intended to merely require an electrical administrator to make some general efforts to educate his or her coworkers about electrical laws, it could have readily drafted the statute to provide for that outcome. Instead, it adopted a statute that requires an electrical administrator to ensure that all electrical work complies with the relevant laws.⁴

⁴ Because RCW 19.28.061 is unambiguous, the Court need not consult legislative history. *See State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). Potelco argues that nothing in the legislative history shown regarding Senate Bill 6225,

“Ensure” means to make sure or certain, and so if the Department establishes at the administrative level that that the contractor violated an electrical rule, it follows that the administrator violated RCW 19.28.061 based on the meaning of “ensure.” The administrator may, however, argue that the company did not commit the underlying violation.

Potelco does not think the administrator is “liable for the actions of other employees” who may not have done their job, but the Legislature designated an individual to take responsibility to ensure electrical work complies with important safety and quality control laws: namely, the administrator. *See* App.’s Br. 10. The potential for a citation creates powerful incentives to avoid that citation. Note that under another important law the Department enforces, the Washington State Industrial Health Act, the Legislature excused behavior if there is due diligence to try to stop a violation, but the Legislature made no such provision here. *Compare* RCW 49.17.120 *with* RCW 19.28.061.

which amended RCW 19.28.061 in 2006, demonstrates an intent to impose strict liability on electrical administrators. App.’s Br. 10-11. This citation to the 2006 amendment is misplaced because RCW 19.28.061 has required electrical administrators to ensure compliance with electrical laws since 1983, and the 2006 amendment did not change that. *See* RCW 19.28.061 (Laws of 1983, ch. 206 § 6; Laws of 2006 ch. 185, § 9). The legislative history regarding the 1983 amendment, which added the language requiring administrators to ensure that all work done complies with the electrical law, is not particularly illuminating on the issue of strict liability, but the Final Legislative Bill Report is consistent with the plain language reading of the statute in that it requires an administrator to ensure that all of the work done by a contractor actually complies with the electrical laws and rules. *See* Final Legislative Bill Report on Engrossed Substitute S.B. 3055, at 3, 5-6, 48th Leg., Reg. Sess. (Wash. 1983) (attached as Appendix 1).

In an attempt to circumvent the “ensure” requirement, Potelco argues that the Court should not interpret the statute to require administrators to ensure actual compliance, contending that this would impose strict liability on administrators, which Potelco claims is disfavored. App.’s Br. 10-11. Potelco is correct that the plain language interpretation here amounts to strict liability in the sense that an administrator receives a citation if a crew does not request an inspection, but it is not strict liability in the sense that the administrator cannot offer any defense to a citation, because an administrator can offer the defense that the crew did not violate the law. But the fact that the statute imposes strict liability is irrelevant for three reasons.⁵

First, while the courts generally disfavor strict liability in a *criminal* context, there is no analogous principle when it comes to *civil* regulatory statutes. *Compare State v. Bash*, 130 Wn.2d 594, 606, 925 P.2d 978 (noting that criminal offenses with no required mental element have a generally disfavored status) with *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 406-09, 914 P.2d 750 (1996) (concluding that agency acted within its authority when it imposed strict liability standard when enforcing air-pollution regulations, without suggesting that the courts disfavor strict liability in a civil context). For

⁵ As noted by the Electrical Board, RCW 19.28.010 does not create this requirement. CP 167. Instead, it is imposed by RCW 19.28.061.

example, in *William Dickson*, the court recognized that the Legislature gave a public agency the authority to adopt rules imposing strict liability regarding certain violations of the Washington Clean Air Act, and the court expressed no reluctance to extend strict liability in that situation and rejected the argument that strict liability imposed an undue hardship. *Id.* at 407-10. In contrast, in *Bash* the Court did not find that an aggressive dog statute imposed strict liability because the wording of the statute did not clearly signal the Legislature's intent to have strict liability with possible criminal punishment. *Bash*, 130 Wn.2d at 610.

It would not make sense to extend the criminal strict-liability doctrine to civil statutes because the principles underlying the rule that strict liability is disfavored in a criminal context do not apply in a civil regulatory context. The reason that the courts disfavor strict liability in a criminal context is that there is a deeply rooted common law tradition that criminal liability only attaches when there is both a *mens rea* (a bad mental state) and an *actus reus* (a bad action). *Bash*, 130 Wn.2d 606-07. But the Legislature does not enact civil regulatory statutes against this common law backdrop. There is no reason to presume that a civil regulatory statute will require proof of both a bad action and a bad mental state before it will impose a civil penalty on one who violates it.

Second, even in a criminal context, the courts do not universally

disfavor strict liability. *Bash*, 130 Wn.2d at 606-07. The courts recognize that the Legislature has the authority to impose strict liability if it decides to do so. *Bash*, 130 Wn.2d at 604; *see also State v. Cleppe*, 96 Wn.2d 373, 378, 635 P.2d 435 (1981). Whether a statute imposes strict liability or not is a question of legislative intent. *Bash*, 130 Wn.2d at 604. *Bash* expressly mentions “electrical codes” as an example of a regulatory offense that falls within the class of criminal statutes that do not necessarily require proof of any mental intent and where strict liability may be appropriate. *Id.* at 607. And here the electrical codes impose only civil liability.

Finally, RCW 19.28.061 requires an electrical administrator to ensure that all electrical work complies with the electrical laws. If the requirement that the Legislature has imposed on electrical administrators imposes strict liability upon them, the court must still give the unambiguous language its full effect. Diluting the statute in the way that Potelco suggests—interpreting it to only require an administrator to provide occasional educational efforts to his or her coworkers—is contrary to its plain language and would undermine the Legislature’s objective of requiring an electrical contractor to designate an individual who is responsible to ensure that the contractor complies with the law.

2. Ample evidence supports the Electrical Board’s finding that the administrator did not ensure Potelco complied with the electrical laws

As noted, there is substantial evidence that Potelco failed to make a timely request for an inspection. CP 52, 96, 105, 117. Lampman was Potelco’s electrical administrator when Potelco performed the work. CP 109-10, 116. Based on these two facts, a reasonable factfinder could find, as the Electrical Board did, that Lampman failed to ensure that Potelco timely requested an inspection. *See* CP 155-61, 166-69. Furthermore, while it was unnecessary for the Department to prove this, Lampman knew that Potelco was performing electrical installation work at the school and knew that that work required Potelco to request a final inspection once done. CP 113-14, 116. Yet he took no steps to make certain that the crew requested a final inspection until he received the October 2013 phone call—long after the inspection-request deadline. *See* CP 117, 122-24.

Ignoring the applicable standard of review, Potelco argues that substantial evidence shows that Potelco timely requested an inspection and therefore Lampman did “ensure” that Potelco complied with the applicable laws. App.’s Br. 9. But substantial evidence shows that Potelco did not timely request an inspection. CP 52, 96, 105, 117, 122-24.

Contrary to Potelco’s suggestion, the Department is not holding

Lampman accountable simply for another person's misdeeds as to which he played no role and over which he had no personal responsibility. *See* App.'s Br. 11. Lampman chose to become the electrical administrator for Potelco and by doing so he took on the legal responsibility under RCW 19.28.061 to ensure that the work Potelco performed complied with the electrical laws. Lampman admitted that he knew Potelco needed to request a final inspection. CP 110, 113-14, 116. Yet he chose to not take action to ensure that an inspection was timely requested. *See* CP 117-24. The Electrical Board properly affirmed the Department's citations.

VI. CONCLUSION

Potelco invites this Court to reweigh the evidence, but the Court does not do this on substantial evidence review and ample evidence supports the Electrical Board's findings. Potelco also invites this Court to adopt a rule that the statute only requires an administrator to make occasional efforts to educate his or her coworkers about the electrical laws, not to make certain that the electrical contractor's work complies with the law. This approach would eviscerate RCW 19.28.061. The Court should reject it and affirm the Electrical Board.

RESPECTFULLY SUBMITTED this 24th day of April, 2017.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, reading "Steve Vinyard". The signature is written in a cursive style with a large, stylized "S" and "V".

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
Office Id. No. 91022
7141 Cleanwater Drive SW
P.O. Box 40121
Tumwater, WA 98501
(360) 586-7715

APPENDIX 1

FINAL LEGISLATIVE BILL REPORT

SSB 3055

C 206 L 83

BY Senate Committee on Commerce and Labor (Originally sponsored by Senators Vognild and Newhouse, and By Department of Labor and Industries Request)

Revising electrical construction laws.

Senate Committee on Commerce and Labor

House Committee on Commerce and Economic Development

House Committee on Labor

SYNOPSIS AS ENACTED

BACKGROUND:

Electrician Licensing

1) Experience

Current law provides that no person may work in the electrical construction trade without being licensed as either a journeyman or specialty electrician. While journeymen are allowed to work in any area of the electrical construction trade, specialty electricians are only allowed to work within their particular specialty. Five specialty areas are set forth in the Washington Administrative Code and these include: residential, domestic appliances, pump and irrigation, limited energy system and signs.

A person is eligible to take the journeyman examination if he or she has four years experience under supervision of a journeyman or has completed an approved apprenticeship program. Supervision means working in a ratio of one journeyman to one trainee as of January 1, 1983. Also, persons learning the electrical construction trade are required to obtain a training permit and report their hours worked to the Department of Labor and Industries on a yearly basis. Department policy also allows a person who has four years of experience in the specialties to take the journeyman examination. Additionally, persons who complete a two-year technical school program may substitute that two years for two years of work experience under a journeyman electrician.

An additional two years experience must be obtained before the person is eligible to take the journeyman's examination.

A person is eligible to take the specialty electrician examination if he or she has two years experience in the particular specialty under the supervision of a journeyman or appropriate specialty electrician. The supervision and permit requirements are the same for a specialty as they are for a journeyman's license.

Questions have arisen over the meaning of the words "electrical construction trade." No definition exists in current law. These words have been interpreted at various times to mean only installation work, and at other times to mean both maintenance and installation work. The basic issue is whether persons who perform maintenance work for commercial businesses or industrial plants where they are employed, or persons who perform maintenance work on a contract basis can be considered to be working in the electrical construction trade.

2) Fees and Renewal

The fees for journeyman and specialty certificates are set by statute at \$15 a year. The fees for these examinations are also set by statute at \$15. The Department is asking for the ability to set these fees by rules.

There is currently no grace period in statute regarding the renewal of journeyman or specialty certificates. If the certificate is not renewed by the expiration date, the person must be retested in order to be recertified.

Contractor Licensing

Current law requires that persons or firms engaged in the electrical construction business obtain a contractor's license. Prerequisites to obtaining a contractor's license are: a) filing of a bond, cash deposit or other negotiable security in the amount of \$3,000; b) designation of an administrator; and c) payment of the licensing fee.

Electrical contractor licenses are designated as either general or specialty. A listing of electrical contractor license specialties are currently found in the Washington Administrative Code and include residential, domestic appliance, pump and irrigation, limited energy system, and signs.

An electrical contractor's license may only be revoked or suspended for "gross and continued violation." The Department has found that meeting this standard is very difficult and leaves it without any workable enforcement provisions.

Existing law provides that a license may be suspended or revoked without a hearing. An appeal is available to the Electrical Board of Appeals, but there is no provision that the filing of an appeal stays the revocation or suspension. Further, if a contractor wants to file a notice of appeal, it must be accompanied by a

check in the amount of \$50. If the appeal is successful, the \$50 is returned.

Administrator Licensing

A person is eligible to be an administrator by passing a test administered by the Department. Also, the grandfathering provisions in current law provide that anyone licensed by the state as an electrical contractor at any time during 1974 has the right to be issued an administrator's certificate without examination. Contractors licensed during 1974 are still using this provision to obtain certificates. The Department is having problems administering this portion of the law because it does not have good records that go back to 1974.

Current law provides little information on the functions of an administrator. The law only provides that an administrator must be a supervisory employee or member of the firm. The Department has adopted a rule in this area, but there is some question as to its enforceability without any specific statutory guidance.

No person may be designated as an administrator under more than one license. If the relationship between the administrator and the contractor is terminated, the contractor's license is void within 90 days unless another administrator is qualified. Concern has been expressed that 90 days is inadequate in the event of the death of the administrator.

Administrator certificates are valid for one year and currently must be renewed within 30 days after the expiration date. The Department believes that this grace period is too short, especially since if the certificate is not renewed within 30 days, retesting is necessary prior to recertification.

There have been some questions over whether the Department has the authority to limit the number of times that a person may take the administrator's test. It is recommended that language be included in statute which provides that no limit may be set.

Electrical Board of Appeals

The Electrical Board of Appeals has only been used once in recent years at great expense. The Department believes that transfer of the Board's functions to the Electrical Advisory Board and the Board of Electrical Examiners will result in more efficient administration.

Miscellaneous

Cities and towns may adopt their own electrical standards provided they are at least equal to state standards. There is no method for resolving disputes that may arise between cities and towns and the Department.

In a dispute over whether the correct state electrical standards are being used, any person may request a hearing before the

Electrical Board of Appeals. The request must be accompanied by payment of \$50 which will be returned to the person requesting the hearing if the person is correct.

SUMMARY:

Electrician Licensing

1) Experience

A person is eligible to take the journeyman examination if he or she has worked in the electrical construction trade a minimum of four years full time, of which two years experience must be in industrial or commercial electrical installation under the supervision of a journeyman. The additional two years experience may be in any one or a combination of the specialties under the supervision of a journeyman or appropriate specialty electrician, or it may be obtained in industrial or commercial electrical installation.

A new specialty certificate, entitled nonresidential maintenance, is created. All previously existing specialties as well as nonresidential maintenance are now included in statute. The requirements for qualifying to take the specialty examination remain unchanged.

A grandfathering provision is included for the nonresidential maintenance specialty which provides that prior to January 1, 1984, applicants are eligible to become a specialist in this area upon certification to the Department that they have the equivalent of two years full-time experience in nonresidential maintenance. The testing, supervision and permit requirements are waived during this time period.

An additional grandfathering provision is added to benefit those persons who have experience in nonresidential maintenance, but who have been precluded from counting this experience toward a journeyman's certificate. Persons applying for a journeyman certificate prior to January 1, 1984, are eligible to take the journeyman examination until July 1, 1984 upon certification to the Department that they have the equivalent of five years full-time experience in nonresidential maintenance, at least two years of which must be in industrial electrical installation. The supervision and permit requirements are waived during this time period.

"Electrical construction trade" is defined to include installation or maintenance of electrical wires of equipment. The inclusion within this definition of the word "maintenance" has the effect of requiring maintenance work to be performed by a licensed journeyman or specialty electrician. However, the exemption from licensing that exists in current law for employees working on the premises of their employer remains unchanged.

2) Fees and Renewal

The fees for journeyman and specialty examinations and certificates are to be set by rule. A person may take an examination as many times as necessary without limit.

A 90 day grace period is allowed in the renewal of a journeyman or specialty certificate before retesting is required. However, persons who renew within the 90 day grace period must pay twice the usual fee.

Contractor Licensing

A new specialty is created for electrical contractors entitled nonresidential maintenance. This specialty, as well as those listed in the Department rules, are set forth in statute.

A contractor's license may be revoked or suspended for "continued noncompliance."

The revocation or suspension of a contractor's license may be stayed by appeal. This is done by providing that any revocation or suspension is not effective for 15 days and allowing the contractor 15 days to file an appeal.

Due to the repeal of the Electrical Board of Appeals, appeals are to be heard before the Board of Electrical Examiners. The cost of an appeal is increased to \$200. If the appeal is successful, the \$200 is returned.

Administrator Licensing

The grandfather provision which allows electrical contractors licensed during 1974 to become administrators without examination is terminated effective January 1, 1984.

In the event of the death of an administrator, an electrical contractor has six months in which to qualify another administrator.

The 30 day grace period for renewal of the administrator's certificate is increased to 90 days. Persons renewing their certificate during this grace period must pay twice the regular fee.

A person may take the administrator's test as many times as necessary without limit.

Administrator duties are set forth in statute. An administrator must:

- 1) Ensure that all electrical work complies with the electrical installation laws and rules of the state;
- 2) Ensure that the proper electrical safety procedures are used;

- 3) Ensure that all electrical labels, permits, and licenses required to perform electrical work are used;
- 4) See that corrective notices issued by an inspecting authority are complied with; and
- 5) Be available during working hours to carry out the duties of an administrator under this section.

The administrator must also notify the Department in writing within ten days if the administrator terminates the relationship with the electrical contractor. The Department is precluded from changing the administrator's duties by rule.

Electrical Board of Appeals

The statute creating the Electrical Board of Appeals is repealed. The functions of the Board are transferred to the Electrical Advisory Board and Board of Electrical Examiners.

Miscellaneous

An arbitration procedure is created for disputes arising between cities and towns and the Department over whether the electrical wiring requirements of cities and towns are at least equal those set by the Department. The arbitration panel is composed of five persons. Two are selected by the Department from the Electrical Advisory Board, two are selected by the city or town, and these four choose a fifth. If the four members cannot agree on a fifth person, the presiding judge of the superior court of the county in which the city or town is located chooses the fifth member. A decision of the arbitration panel is appealable to that same superior court within 30 days.

Disputes over whether a person is complying with the state's electrical codes will be resolved upon request by the Electrical Advisory Board. The cost of such hearing is increased to \$200.

VOTES ON FINAL PASSAGE:

| | | | |
|--------|----|---|--------------------|
| Senate | 39 | 9 | |
| House | 95 | 1 | (House amended) |
| Senate | 40 | 7 | (Senate concurred) |

EFFECTIVE: July 24, 1983

NO. 49716-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

POTELCO, INC. and
JEFF LAMPMAN,

Appellants,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondent.

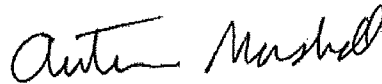
**DECLARATION OF
SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Respondent, Department of Labor and Industries and this Declaration of Service to all parties on record as follows:

Via Email and First Class U.S. Mail, Postage Prepaid to:

Gena Bomotti
Kristina Markosova
Riddell Williams, P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154-1065
gbomotti@riddellwilliams.com
kmarkosova@riddellwilliams.com

DATED this 24th day of April, 2017, at Tumwater, Washington.



AUTUMN MARSHALL
Legal Assistant 3
(360) 586-7737

WASHINGTON STATE ATTORNEY GENERAL
April 24, 2017 - 11:16 AM
Transmittal Letter

Document Uploaded: 4-497166-Respondent's Brief.pdf

Case Name: Potelco, Inc. and Jeff Lampman v. Department of Labor and Industries

Court of Appeals Case Number: 49716-6

Is this a Personal Restraint Petition? Yes ☒ No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): ____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ____

Comments:

No Comments were entered.

Sender Name: Steve Vinyard - Email: SteveV1@atg.wa.gov